

ARGUED DECEMBER 14, 2018

NO. 18-3071

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

IN RE GRAND JURY SUBPOENA

Appeal from the United States District Court for the District of Columbia
No. 1:18-mj-0041

REPLY IN FURTHER SUPPORT OF MOTION TO UNSEAL

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REPLY IN FURTHER SUPPORT OF MOTION TO UNSEAL

Pursuant to Federal Rule of Appellate Procedure 27(a)(4), the Reporters Committee for Freedom of the Press (the “Reporters Committee”) respectfully submits this Reply in Further Support of its Motion to Unseal.¹

Appellant’s Response confirms that the Motion to Unseal should be granted. Appellant—the witness held in contempt in this matter—“takes no position” on the Reporters Committee’s Motion to Unseal. Country A’s Response to the Reporters Committee for Freedom of the Press’s Mot. to Unseal (“Response”) at 1. Thus, it appears that Appellant itself has no interest in seeking to preserve the secrecy of its identity or its penalty. *Id.*; *see also* Ex. A at 1 n.1 (noting in “Country A’s” unredacted Supplemental Brief In Support of its Petition for a Writ of Certiorari that it refers to itself as “Country A” “[b]ecause of the sealing order in place”). To the contrary, the Response suggests that Appellant is *willing* to share its identity publicly but that the government is barring it from doing so. Whether that tacit suggestion is accurate, its existence subjects these proceedings to the very risks that undergird the rationales for the public’s right of access in the first place. *See* Mot. to Unseal at 10-11. Indeed, as the Response makes clear, the public’s interest in understanding the full scope of these proceedings—including the identity of “the

¹ Although Appellant’s Response to the Motion to Unseal was filed under seal on January 16, 2018, it was not served on the Reporters Committee until February 1, 2019, rendering this Reply timely. *See* Fed. R. App. P. 27(a)(4).

Corporation” or “Country A,” *see* Response at 1 n.1—and in vindicating the public’s ability to serve as a check on the exercise of prosecutorial and judicial power is manifest here.

Particularly in contempt proceedings where the power of the court can *only* be checked by public scrutiny, the need for public access is at its zenith. *See* Mot. to Unseal at 14-15 (collecting cases). Appellant apparently still disputes that it can be subject to any penalty for refusing to comply with the grand jury subpoena at issue in this action, Response at 1 n.1, yet the public is unable to evaluate whether the district court applied its contempt powers consistent with the law because the record remains sealed, even though this Court released a public version of its ruling. This Court should lift the veil on these proceedings, as Appellant seemingly is willing to do, and let the public see for itself the record regarding whether Appellant is a “Country” immune from our laws, as Appellant suggests, or a “Corporation,” as the courts have found.²

Moreover, the secrecy surrounding Appellant’s Response to the Motion to Unseal further demonstrates that the government’s assertions as to what materials

² To the extent Appellant—a witness not subject to the secrecy provision of Federal Rule of Criminal Procedure 6(e), *see* Ex. A at 1 n.1 (“Country A understands that it is only a witness in the underlying investigation.”)—wishes to reveal its identity but is prohibited from doing so by the government or otherwise, such a prohibition would present both due process and First Amendment concerns.

should and should not be sealed should be closely scrutinized. As this Court explained in its order dated February 1, 2019, Appellee—presumably the government, *see* Cert. of Service, Response to Mot. to Unseal—opposed the public filing of Appellant’s two-page Response. On what basis, neither the Reporters Committee nor the public knows. While the Reporters Committee appreciates the Court’s overruling of the government’s secret objections, it is clear from the face of Appellant’s Response that the government had no rational basis—much less any compelling one—to argue that any portion of the Response should be kept sealed, particularly where the government *itself* has disclosed the names of Appellant’s counsel, the only previously secret information contained in the Response. *See* Statement of Related Matters. If the government’s opposition to Appellant’s attempt to file the Response publicly is any indication, the government’s positions as to what can and cannot be sealed in this manner are inconsistent with what the Constitution and common law allow.

Nor can the government justify continued sealing of these proceedings in an attempt to keep secret the grand jury investigation from which these proceedings emanate. The district court’s now-unsealed docket identifies members of Special Counsel Robert Mueller’s office as the attorneys of record in the case. Ex. B (district court docket). The government can no longer deny that the contempt order leading to this appeal arose from the Special Counsel’s investigation; it is

now a matter of public record. *See* Josh Gerstein, *Muller Role Confirmed In Subpoena Battle With Mystery Firm*, Politico (Feb. 1, 2019), <https://politi.co/2HNMa30>. With this connection made, the government's ability to demonstrate a compelling interest to seal any portion of this record is necessarily weakened even further.

Finally, although the government apparently opposed the public filing of Appellant's Response, *see* Order dated Feb. 1, 2019, the Reporters Committee and the public still have no idea whether, or on what basis, the government opposes the Motion to Unseal itself. To the extent the government has secretly opposed the Motion to Unseal, the Reporters Committee should at least be given some opportunity to review that opposition and respond. *See* Fed. R. App. P. 27(a)(4). If the government's argument against unsealing is—as it intimated in the Supreme Court, *see* Statement of Related Matters at 3—that no right of public access exists here, the Reporters Committee deserves the opportunity to respond to that incorrect legal argument head-on. And if the government's justification for sealing relies on some factual contention, the Reporters Committee, like the public, should have the ability to understand that rationale and to rebut it. The First Amendment and the common law strictly limit the government's ability to deprive the public of access to contempt and appellate proceedings. *See* Mot. to Unseal at Arg. Pt. I-II. The government should not be allowed to justify secrecy with yet more secrecy.

For the foregoing reasons, the Reporters Committee respectfully requests that this Court grant its Motion to Unseal and direct the filing of public versions of the briefs, the record, and the oral argument transcripts in this appeal, allowing only those redactions that are narrowly tailored to serve a compelling governmental interest. And given that “the Corporation” or “Country A” advances no interest in maintaining secrecy here, this Court should direct that these public filings identify Appellant, particularly now that so much of these proceedings have entered the public domain.

February 4, 2019

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CERTIFICATE OF COMPLIANCE

1. This Reply Brief in Further Support of the Motion to Unseal complies with the type-volume limitation of Federal Rules of Appellate Procedure 27(d) because it contains 1088 words, excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(f); and
2. This Reply Brief in Further Support of the Motion to Unseal complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 2019, I caused the foregoing Reply Brief in Further Support of the Motion to Unseal to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the Court's CM/ECF system. I further certify that four copies of this Statement were filed with the clerk, pursuant to Circuit Rule 27(b), by hand delivery to the clerk, pursuant to Circuit Rule 25(d).

February 4, 2019

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1,
the Reporters Committee for Freedom of the Press certifies that it is an
unincorporated association of reporters and editors with no parent corporation and
no stock.

February 4, 2019

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CERTIFICATE OF PARTIES

Because the identity of the parties is not public, the Reporters Committee for Freedom of the Press is not able to provide a certificate of parties, intervenors, and amici who have appeared before the district court and are in this court, pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A).

Date February 4, 2019

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